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No. 93-1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: TIME WARNER INC.
SECURITIES LITIGATION

STEVEN J. ROSS, N.J. NICHOLAS, JR., GERALD M. LEVIN, BERT W. WASSERMAN, and TIME WARNER, INC.

Petitioners,

v.

ZVI TRADING CORP. EMPLOYEES' MONEY PURCHASE PLAN AND TRUST and BARRY ZONON

Respondents.

RESPONDENT BARRY ZONON'S REPLY TO BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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BARRY ZONON'S REPLY TO BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Respondent Zonon posited two bases for his conditional cross-petition. The second circuit erred by holding that: (i) statements attributed to unnamed corporate spokesmen are necessarily immaterial; (ii) the contents of certain pre-May 1 statements were not actionable as a matter of law ("Zonon Br." at 18 *et seq.*).

Petitioners' brief in opposition to respondents' cross-petitions claims that the immateriality of statements attributed to unnamed corporate spokesmen falls within "a long line of unbroken precedents". R. Opp. Br. at 7. There is no such line. It defies common sense to draw one.

Petitioners defend the dismissal of the pre-May 1 claims on the factual grounds that the statements were not actionable and that respondents have conceded as much. *Id.*, at 3. Respondents made no such concession. The dismissal below and petitioners' arguments are contrary to this Court's recent instruction in *Virginia Bankshares v. Sandberg*, _____ U.S. _____, 111 S.Ct. 2749, 2757-59 (1991).

I

STATEMENTS BY UNNAMED CORPORATE SPOKESMEN ARE NOT IMMATERIAL AS A MATTER OF LAW

The second circuit squarely but incorrectly held that statements by unnamed corporate spokesmen are immaterial, reasoning that few reporters would fail to detect or knowingly rely on fraudulent statements, that investors tend to discount

unattributed statements, and that discovery to trace the source to corporations may prove burdensome (petition at 23a).

The holding was contrary to a wall of authority built from knowledge of how markets operate. See, e.g., *Basic v. Levinson*, 485 U.S. 224, 246 & n.24 (1988); Zonon Br. at 19-21.[1]

Petitioners do not take direct issue with our legal analysis. Instead, they claim that the instant pleadings failed to satisfy rule 9(b) requirements (R. Opp. Br. at 6-7), citing for support what they characterize as "a long line of unbroken precedents." (*Id.* at 7).

Surely that cannot be so. Respondents cite no Supreme Court authority, and the only appellate level decision they cite preceded the second circuit by about one month.[2]

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[1]. Illustrations of the common sense reality that the market place routinely considers unattributed statements material appears often and in many forms. Thus, the March 21, 1994, edition of *Barron's* reported that Wilshire Technologies attacked an analyst who had impeached the company's revenues, earnings, and prospects (MW5, col. 1, 2). The company characterized the analyst's statements as "false and misleading." (*ibid.*) Apparently the company believed that the analysts' unattributed statements were material. (The analyst reported his opinions when the stock was trading at about $20. When Wilshire announced on March 14, 1994, that it would withdraw its 1993 earnings, its stock traded at about $8 3/8.)

[2]. *Raab v. General Physics Corp.*, 4 F.2d 286 (4th Cir.
(continued...)

Petitioners' other "authorities" do not include a single appellate level decision. *State Teachers Retirement Board v. Fluor*, 6521 F.2d 843 (2d Cir. 1981), did not involve rule 9(b). None of a handful of district court decisions proffered by defendants dares go so far as the second circuit in holding that unattributable analysts' statements are immaterial as a matter of law. To the contrary, they recognize the market influence and integrity of analysts' work product. See, *In re Verifone Securities Litigation*, 784 F.Supp. 1471, 1481 (N.D. Cal. 1992), *aff'd*, 11 F.3d 865 (9th Cir. 1993) (affirmance not on 9(b) grounds). None of them involves an instance where the unattributed statements rehearse attributed ones concerning the *status quo* of material matters. None grapples with the appellate authorities cited by Zonon. (Zonon Br. at 19-21.) All play loosely with the interrelated concepts that the federal rules do not require the pleading of evidence, and that pleading requirements are relaxed where defendants or third-parties are exclusively possessed of discoverable information. *Id.*

In sum, these pleadings reasonably imply that petitioners were the source, direct or indirect, of the somewhat misnomered unattributed statements. To require pleading additional detail would require the pleading of evidence. Rule 8 does not impose that requirement. Neither does rule 9 where only defendants or third parties possess the information underlying the statements in question. Zonon Br. at 20-21.

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[2](...continued)
1993), was decided August 26, 1993, seven months after the second circuit heard arguments on this action and five weeks before the decision.

II

THE PRE-MAY 1 STATEMENTS WERE ACTIONABLE.

Virginia Bankshares, 111 S.Ct. at 2725-59, held that directors' statements of reasons, opinions, or belief may be actionable. Zonon Br. at 21-22. The statements at issue comprise that and sometimes more; they include misstatements of the *status quo*. Zonon Br. at 21-22 & n.23. (Time Warner claimed, *e.g.*, to have been "partnering" with prospects who "share our vision." *See* Zonon Br. at p. 21, n. 23).

Petitioners take issue with what they characterize as unspecific announcements regarding strategic alliances. Petitioners miss the import of *Virginia Bankshares*, whose principles apply *a fortiori* to the facts at bar. Zonon Br. at 22. Petitioners misreported the *status quo* of their talks with strategic prospects and omitted to disclose the materially different financial alternatives considered by them. Thus, for petitioners to claim that the second circuit "*merely* held that the particular allegations of the pleading in this case were deficient" (emphasis supplied) is to defend on the ground that the second circuit "merely" ignored this Court's recent teaching.

Finally, citing to paragraph 53 of the complaint, petitioners assert that "[r]espondents do not claim, in their briefs or complaint, that defendants' statements were false when made or that defendants' expectations lacked a basis in fact." To the contrary, respondents have consistently pleaded that petitioners' statements were either false (complaint, ¶¶ 3, 8, 20, 53, 71, 84, 92, 94-97, 101), misleading (complaint, ¶¶ 9, 11, 20, 21, 22, 53, 71, 84, 92, 94-97, 101), or lacking a

reasonable basis in fact (complaint, ¶ 95). And as for paragraph 53? It actually states: "*even if* [defendants' statements were] true or issued with a reasonable basis and in good faith when originally made, [the statements] had become and were false and misleading" (emphasis supplied).

CONCLUSION

For the reasons demonstrated herein and in the cross-petition, the Court should grant the cross-petition for a writ of certiorari in the event that it grants the petition.

Dated: March 24, 1994

Respectfully submitted,

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